BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Program Access	)	
Rules and Examination of Programming Tying	)	MB Docket No. 07-198
Arrangements	)	

COMMENTS OF TIME WARNER INC.

Michael H. Hammer
Jonathan Friedman
Megan Anne Stull
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
Attorneys For Time Warner Inc.

January 4, 2008

Table of Contents

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Program Access	)	
Rules and Examination of Programming Tying	)	MB Docket No. 07-198
Arrangements	)	

COMMENTS OF TIME WARNER INC.

By its attorneys, Time Warner Inc. ("TW") hereby submits these comments in response to the Notice of Proposed Rulemaking ("*Notice*") in the above-captioned proceeding.[1]

I. Introduction And Summary

In the *Notice* the Commission seeks comments about proposals that, if adopted, would further regulate segments of the multichannel video programming industry that currently thrive in the absence of such intervention. In the 1992 Cable Act, Congress expressly directed the Commission to "rely on the marketplace, to the maximum extent feasible," and regulate only where the market is clearly defective. Today, the marketplace is working effectively. The industry is experiencing unprecedented growth and competitiveness and rapid technological changes are increasing the number of competitors and introducing new forms of competition. There is simply no evidentiary basis for additional regulations, and the Congressional directive to rely on the marketplace mandates that the Commission exercise restraint in this area.

---

[1] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Notice of Proposed Rulemaking, 22 FCC Rcd. 17791 ¶ 112 (2007) ("*Notice*").

In these comments, TW focuses on two proposals raised in the *Notice*: (1) whether the Commission should impose a "standstill" that would compel programmers to continue supplying MVPDs with programming pending resolution of a program access dispute; and (2) whether the Commission should restrict programmers from offering their services to MVPDs in discounted bundles.[2]

In Section II below, TW demonstrates that the Commission does not have the authority to adopt either proposal. Moreover, even if the Commission had the authority to adopt the proposed rules, doing so without a sufficient evidentiary record -- which is completely lacking here -- would violate the First Amendment.

In Section III, TW describes additional problems with the proposed standstill provision. Specifically, a standstill would (1) supplant the operation of normal market forces by imposing a licensing agreement on the parties to a carriage negotiation, and (2) distort market negotiations between MVPDs and programmers by tilting the balance of power in favor of MVPDs.

In Section IV, TW explains that any rule that prevents programmers from offering their programming to MVPDs in discounted bundles would undercut the pro-consumer benefits of bundling and conflict with Commission precedent and Congressional statements recognizing that bundling is a lawful and competitive practice.

II. The Commission Lacks The Authority To Adopt A Standstill Requirement Or To Impose Restrictions On Bundling.

The Commission invited comment on the necessity and effects of a "standstill" rule and on "whether the Commission has the jurisdiction to preclude tying arrangements by satellite

---

[2] In the *Notice*, the Commission refers to the "tying" of programming networks, a term that is improperly used in this context, as described in Section IV below.

cable programmers under Section 628(b) or any other statutory authority."[3] The "principal question is whether Congress 'delegated authority' to the FCC to promulgate" the proposed rules.[4] It is clear that Congress has not done so.[5]

A. The Commission Lacks Authority to Adopt A Standstill Requirement.

Section 628 is a self-contained statutory scheme: it defines its own purpose (Section 628(a)), proscribes conduct contrary to that purpose (Sections 628(b)-(c)), and sets up a process for adjudicating grievances (Sections 628(d)-(f)). Nothing in Section 628 provides a basis for imposition of a significant remedy while a program access complaint is under review. In fact, a rule authorizing such a remedy runs directly *counter* to the express language of the statute.

Section 628(b) prohibits a satellite cable programming vendor affiliated with a cable operator from engaging in "unfair methods of competition or unfair or deceptive acts or practices the purpose or effect of which is to hinder significantly . . . or prevent" an MVPD from providing

---

3 *Notice* ¶ 131.

4 *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002).

5 To the extent that either proposal is predicated on the notion of certain programming networks having "marquee" or "must-have" status, such an approach is unsupported by the record. The Commission has never defined what constitutes "marquee" or "must-have" programming, nor has it ever established any specific criteria for what might qualify as such programming. In fact, the Commission has recognized "the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition," *see Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd. 12124 ¶ 69 (2002), and noted in its recent program access order that "[n]o commenter has provided a rational and workable definition of 'must-have' programming." *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd. 17791 ¶ 69 (2007). Furthermore, Commissioner Copps has warned the Commission "to be careful before starting down the slippery slope of determining what is and isn't 'must-have' cable content." *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation et al., to Time Warner Cable Inc. et al.*, Memorandum Opinion and Order, Dissenting Statement of Commissioner Michael Copps, 21 FCC Rcd. 8203 (2006).

programming to consumers. Section 628(c) prohibits certain specific practices, including discrimination and exclusive dealing (unless pre-approved by the Commission).

The Commission has the authority to impose remedies, but only *after* it finds that a programmer has violated Section 628. Section 628(d) provides that any MVPD aggrieved by conduct it alleges violates subsections (b) or (c) "may commence an adjudicatory proceeding at the Commission."[6] Section 628(e)(1) provides that "*[u]pon completion of such adjudicatory proceeding*, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming" to the aggrieved MVPD.[7]

A standstill requirement would be contrary to that congressional grant of authority by requiring carriage and dictating the terms of carriage *before* any determination has been made that the programmer has violated the rules. However, the express extent of the Commission's authority under Section 628 is clear -- the Commission may only force a programmer to make its programming available to an MVPD *after* it has found that the programmer has violated the rules.

The Commission itself has acknowledged that it lacks authority to impose standstill requirements in circumstances involving similar carriage disputes. Just last year, in a retransmission consent dispute between Mediacom and Sinclair, the Commission acknowledged

---

6 47 U.S.C. § 548(d).

7 *Id*. § 548(e) (emphasis added). Section 628(e)(2), which provides that the remedies authorized in Section 628(e)(1) are "in addition to" other remedies prescribed under the Act, cannot reasonably be read to confer on the Commission the authority to disregard the "upon completion" requirement in Section 628(e)(1). Moreover, Section 628(e)(2) cannot be the basis for a standstill requirement because no other provision of the Act authorizes the Commission to "establish prices, terms, and conditions of sale" of satellite cable programming to MVPDs.

that it does not have the authority to adopt a standstill where there has been no determination of a rule violation. The Commission declined to grant Mediacom's "request for interim carriage" of Sinclair's broadcast networks while the dispute was ongoing.[8] The Commission noted that the Media Bureau had made an initial determination that Sinclair did not violate the Commission's good faith rules in its negotiations with Mediacom, and "[a]bsent a finding of a violation, the Commission is without authority to grant the relief Mediacom is seeking."[9] This precedent is particularly compelling because the Commission has recognized that there are similar policy considerations underlying the retransmission consent and program access rules.[10]

Nor can the Commission adopt a standstill requirement based on its authority under Sections 4(i) or 303(r) of the Communications Act.[11] Courts have determined that these provisions only provide the Commission with ancillary authority to adopt rules that are necessary to meet obligations specified in other sections of the Act, not authority to engage in free-lance policymaking.[12] Especially where the specific authority in Section 628 does not contemplate the

---

8 *See Mediacom Commc'ns Corp. v. Sinclair Broad. Group*, Order, 22 FCC Rcd. 248 ¶ 3 (2007) ("*Mediacom Order*").

9 *Id*. The Commission reached this conclusion even though it recognized "the cost to consumers" if Mediacom and Sinclair did not reach a carriage agreement. *Id*.

10 *Notice* ¶ 120 ("We note that the competitive harm and the adverse impact on consumers would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster.").

11 *Id.* ¶ 132. The Commission did not find in the *Mediacom Order* that Sections 4(i) or 303(r) gave it authority to adopt a standstill even in the absence of a statutory provision, such as Section 628, that expressly limited the Commission to imposing such relief only after a finding of a rule violation.

12 *See Am. Library Ass'n v. FCC*, 406 F. 3d 689, 702 (D.C. Cir. 2005) (without specific statutory authorization, the Commission's purported authority is "ancillary to nothing"). *See also California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) ("Title I [of the Communications Act] is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities.") (citing *U.S. v. Sw. Cable Co*., 392 U.S. 157, 178 (1968) (The Commission's authority under Title I "is restricted to that reasonably ancillary to the effective performance of its various responsibilities for the regulation of television broadcasting.")).

Commission requiring a programmer to permit an MVPD to carry its network prior to a finding that the network violated the rules, the general authority in Sections 4(i) and 303(r) cannot be read to permit such a result.[13]

B. The Commission Lacks Authority To Restrict The Bundling Of Programming.

Section 628(b) does not provide a statutory basis for the Commission to adopt rules prohibiting or restricting the bundling of programming networks. The Commission's authority under Section 628(b) is limited to the prevention of conduct the purpose or effect of which is "to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming."[14] In its *1993 Program Access Order*, the Commission recognized that "[t]he objectives of the provision . . . are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition."[15] The Commission did not identify what specific practices might run afoul of Section 628(b), but indicated that it would provide a basis for Commission action "should additional types of conduct emerge as barriers to competition and *obstacles to the broader distribution of satellite cable and broadcast video*

---

13 "[I]t is a commonplace canon of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). *See also Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (the Supreme Court "has understood the present canon ('the specific governs the general') as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision."); *California v. U.S.*, 438 U.S. 645, 690 (1978) (stating that a "general provision could not override a specific provision of the same Act").

14 47 U.S.C. § 548(b).

15 *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359 ¶ 40 (1993) ("*1993 Program Access Order*").

programming."[16] In its recent MDU exclusivity order, the Commission further construed Section 628(b) as prohibiting "any practices that unfairly *deny* MVPDs the ability to provide [satellite cable programming and satellite broadcast programming] to consumers."[17]

Simply stated, offering a discount for carriage of multiple networks does *not* "hinder significantly or prevent" MVPDs from providing satellite cable programming to consumers, and the Commission does not have before it *any* factual or evidentiary basis to suggest that it does. To the contrary, programmers that sell their services in discounted bundles do so in order to *expand* distribution of their services in a cost-effective way. Therefore, Section 628(b) cannot be construed to prohibit bundling.

In addition, the legislative history of Section 628 makes clear that the concern Congress sought to address was the possible effects of vertical integration on programming distributors.[18] Indeed, the prohibitions of Section 628(b) and (c) apply *only* to vertically integrated satellite cable programming vendors.[19] Because bundling plainly is not related to vertical integration, as

---

16 *Id.* ¶ 41 (emphasis added).

17 *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd. 20235 ¶ 44 (2007) (emphasis added).

18 *See* H.R. Rep. No. 102-628 at 41 (1992) ("[V]ertically integrated operators have impeded the creation of new programming services by refusing or threatening to refuse carriage to such services that would compete with their existing programming services."); S. Rep. No. 102-92 at 26 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1159 ("[T]he Committee received testimony that vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms.").

19 *See 1993 Program Access Order* ¶ 29.

the Commission recognized in the *Notice*,[20] Section 628(b) cannot provide the Commission with authority to restrict bundling by vertically integrated programmers.

C. First Amendment Considerations Require The Commission To Exercise Regulatory Restraint In Interpreting The Scope Of Its Authority Under Section 628.

It is incontrovertible that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[21] It is also well established that the Commission's specific authority to regulate the conduct of vertically integrated programmers under Section 628 implicates protected speech.[22] The First Amendment must therefore "inform and give shape" to the Commission's exercise of its authority in this rulemaking.[23]

Here, the First Amendment militates *against* further regulation of the speech-related activities of programmers under Section 628. The Commission has not, and cannot, demonstrate that the proposed rules are essential to further the Congressional purpose in enacting the program access statute or are consistent with the congressional directive that the Commission "rely on the marketplace to the maximum extent feasible."[24] Thus, even if Section 628 could somehow be read to authorize adoption of the proposed rules, the Commission should not adopt such an

---

20 *Notice* ¶¶ 121-132 (recognizing that broadcasters and satellite programming networks unaffiliated with a cable operator offer their programming in bundles).

21 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner*").

22 *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 977-79 (D.C. Cir. 1996) ("*Time Warner*").

23 *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984).

24 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(2), 106 Stat. 1460, 1463 (1992) ("1992 Cable Act").

expansive reading of the statute. In the absence of a *clear* statutory directive to adopt the proposed rules, the Commission must make every effort to avoid a constitutional infringement.[25]

D. The Proposed Rules Would Violate The First Amendment.

Rules regulating programmers -- and specifically, rules promulgated under Section 628 -- are subject, at the very least, to intermediate First Amendment scrutiny, which is "applicable to content-neutral restrictions that impose an incidental burden on speech."[26] Under the intermediate standard, a regulation would be upheld only if "it furthers an important or substantial governmental interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[27] The proposed bundling and standstill rules do not meet these requirements.

In order to evaluate whether any rule adopted pursuant to Section 628 is consistent with the First Amendment, there needs to be a substantial evidentiary record.[28] Such an evidentiary record does not exist with respect to either proposed rule, nor could it, because the Commission has not put forward any specific proposed rules that parties could evaluate or offer evidence

---

25 *See U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 68-9 (1994); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

26 *Turner*, 512 U.S. at 662. *See also Time Warner*, 93 F.3d at 978 (applying intermediate scrutiny to Section 628 program access rules); *Time Warner Entm't Co., L.P. v. U.S.*, 211 F.3d 1313, 1318 (D.C. Cir. 2000) (applying intermediate scrutiny to the 1992 Cable Act's subscriber-limit provisions). Moreover, it is well-established that regulations compelling speech, *Riley v National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988); *Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 9 (1986), and regulations that reflect a legislative or administrative judgment about the appropriate "mix" of speech, *Pac. Gas and Elec. Co*., 475 U.S. at 12; *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974), trigger strict scrutiny under the First Amendment.

27 *Turner*, 512 U.S. at 662.

28 *Id.* at 666.

either in support or opposition,[29] understandably, in light of the evidence demonstrating that marketplace competition is thriving.[30]

Without a specific evidentiary record, the Commission cannot adequately measure any proposed rule against the guarantees of the First Amendment. As the Supreme Court instructed:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured" . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way . . . "[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[31]

Moreover, the *only* interest that can be inferred from the *Notice* is the protection of small, rural cable operators that supposedly lack leverage in their negotiations with programmers.[32] In *Turner*, the Court found that promotion and protection of competition are an important governmental interest; the Commission here, however, seeks to protect certain *competitors*, not *competition*. The protection of a set of competitors, without more, is not an important government interest.[33]

---

29 *See, e.g., Leased Commercial Access, and Development of Competition and Diversity in Video Programming Distribution and* Carriage, Report and Order and Further Notice of Proposed Rulemaking, Statement of Commissioner Jonathan S. Adelstein, MB Dkt. No. 07-42 (Nov. 27, 2007) (noting that Commissioner Adelstein "would have preferred that [the Commission] first solicited meaningful public comment and review" before adopting a new methodology "without sufficient public input, independent review or any transparency . . . [A]s an expert governmental agency, it is incumbent upon us to provide regulatees with a process that is fair and open, and inspires confidence in the American people and the courts.").

30 *See infra* at 11-12.

31 *Turner*, 512 U.S. at 664 (citations omitted).

32 *Notice* ¶ 120.

33 In *Turner*, the Court allowed protection of a set of programmers -- local broadcasters. There, however, the Court recognized certain interests served by their protection, such as localism and the protection of diversity of ideas. These interests are inapplicable to local and rural MVPDs, and were not identified in the *Notice*.

To the extent the Commission seeks to protect competition, rather than a set of competitors, it -- again -- lacks any evidence that discounted bundling actually harms competition. In fact, all publicly available evidence indicates that competition is thriving. In the last six years, for example, DirecTV and EchoStar have grown from a combined 16 million subscribers and an 18 percent share of the MVPD marketplace[34] to over 30 million subscribers and a 31 percent share of the MVPD marketplace;[35] Verizon and AT&T, two companies with revenues and resources much larger than any cable company, are aggressively providing video services;[36] and the distribution of video programming on the Internet and via mobile phones has exploded.[37] At the same time, cable's share of MVPD subscribers is at its lowest point since

---

34 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd. 1244 ¶ 8 (2002).

35 *See* Press Release, The DIRECTV Group, Inc., *The DIRECTV Group Announces Third Quarter 2007 Results* 3 (Nov. 7, 2007) (reporting 16.56 million subscribers as of September 30, 2007); Press Release, EchoStar Communications Corp., *EchoStar Reports Third Quarter 2007 Financial Results* 1 (Nov. 9, 2007) (reporting 13.695 million subscribers as of September 30, 2007); SNL Kagan, *Multichannel Media Index,* Media Money, Sept. 18, 2007, at 6 (reporting 96.9 million total MVPD subscribers).

36 *See* Press Release, Verizon Communications Inc., *Verizon Reports Continued Success in 3Q 2007* (Oct. 29, 2007) (reporting 717,000 total FiOS TV customers); Press Release, AT&T Inc., *AT&T Delivers Strong Third-Quarter Results; Growth Highlighted by Robust Wireless Gains, Advances in Enterprise Services, Accelerated TV Ramp* (Oct. 23, 2007) (reporting 126,000 U-verse TV subscribers).

37 By 2006, nearly 70 percent of U.S. households subscribed to an Internet service, *see* Matthew Colella, *Everything's Coming Up Broadband*, The Bridge, Oct. 20, 2006, at 4, *available at* http://www.skyreport.com/media/archives/Broadband_BR102006.pdf, and 107 million Americans, or three out of every five Internet users, had viewed video online. *See Study: 107 Million People Viewed Video in July*, USA Today, Sept. 28, 2006, *available at* http://www.usatoday.com/tech/news/2006-09-28-online-video-study_x.htm. Many of the major broadcast and cable networks are offering some of their most popular shows over the Internet. *See also* Matthew Karnitschnig, *Google to Distribute MTV Clips*, Wall St. J., Aug. 7, 2006 ("Recent months have seen an explosion in the amount of ad-supported video content available on the Web from major TV networks."), *available at* http://online.wsj.com/article/SB115490043035628128.html?mod=home_whats_news_us. On YouTube, which launched only three years ago, consumers view short videos more than 70 million times a day, *see* Kevin J. Delaney, *With NBC Pact, YouTube Site Tries to Build a Lasting Business*, Wall St. J., June 27, 2006, at A1, and MySpace, which cut a deal with Fox to include ad-supported episodes of Fox's prime-time shows to its service, *see Fox Offers Shows on MySpace, FoxTV Station Sites*, USA Today, Oct. 3, 2006, *available at* http://www.usatoday.com/tech/news/2006-10-03-fox-myspace_x.htm?POE=TECISVA, provided 1.4 billion video streams in August 2006. *See MySpace Trouncing YouTube in Web Video Streaming*, PC Magazine, Oct. 19, 2006. Nearly eight million Americans are using their phones to watch video programming today, *see Mobile Video Hot*

(footnote continued…)

1990,[38] and the number of programming networks vertically integrated with a cable operator has plummeted from 57 percent in 1992 to 14.9 percent today.[39] These facts demonstrate that there is no impediment to competition in the MVPD business. As a result, there is no substantial governmental interest related to competition that would justify imposing a standstill rule or restrictions on discounted bundling.

Finally, even if bundling somehow could be shown to harm competition -- contrary to the Commission's and the courts' statements that bundling is a pro-competitive practice -- the antitrust laws provide the appropriate remedy.[40]

III. There Is No Factual Or Policy Basis For Adoption Of A Standstill Requirement In Program Access Disputes.

As explained above, the Commission lacks authority to adopt a standstill requirement for program access disputes and, even if it had the authority, such a requirement would violate the First Amendment. Moreover, the Commission should not adopt a standstill requirement because it would skew marketplace negotiations, increase the likelihood of program access complaints, and reduce the likelihood of negotiated resolutions of carriage disputes. Although a standstill

(…footnote continued)

Overseas, Heating Up at Home, Telco Media News, Oct. 17, 2006, and the number is expected to jump to 24 million by 2010. *See* Edward C. Baig, *Will Consumers Tune in to a Tiny TV in Their Hand?,* USA Today, Aug. 17, 2006, *available at* http://www.usatoday.com/tech/wireless/2006-08-17-mobile-tv_x.htm.

38 *See* Steve Donohue, *Cable Penetration Hits 16-Year Low*, Multichannel News, Dec. 13, 2006, *available at* http://www.multichannel.com/article/CA6399767.html.

39 *Compare* H.R. Rep. No. 102-628, at 41 (1992) (reporting that "39 [of the 68 nationally delivered cable video networks], or 57 percent, have some ownership affiliation with the operating side of the cable industry"), *with* News Release, FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* 4 (Nov. 27, 2007) (reporting that 84 (or 14.9 %) of the 565 national programming networks were vertically integrated or affiliated with a cable operator).

40 *See* Section IV below.

requirement would not be justified for any programming network, it would be particularly unnecessary and unworkable in the case of premium networks.

A. A Standstill Requirement Would Skew Marketplace Negotiations, Increase The Likelihood Of Program Access Complaints, And Reduce The Likelihood of Negotiated Resolution Of Carriage Disputes.

Program carriage contracts have always been -- and should continue to be -- the product of negotiations between programmers and distributors. Indeed, thousands of such contracts are negotiated successfully each year. In the 15-year history of the program access rules, only a handful of contract negotiations have ever resulted in a complaint, and the vast majority of those complaints were settled before any action was taken by the Commission. In short, the marketplace *is* working efficiently; parties *can and do* resolve program carriage disputes at the bargaining table, and there is no basis for the Commission to intervene in that process, particularly in a manner that would so plainly skew the marketplace in favor of one party. Yet that is exactly what a standstill requirement would do.

The type of standstill some parties have proposed -- in which the MVPD has a right to continue carriage of a network but is not prohibited from dropping the network[41] -- is particularly egregious. If the Commission were to remove the ability of only one side of the negotiations to walk away (*i.e.*, a network *could not* say it would deauthorize carriage by an MVPD if the parties cannot come to terms, but the MVPD *could* say it would stop carrying the network if the parties cannot come to terms), it would be shifting the bargaining power toward the MVPD.

Furthermore, any standstill requirement would *increase* the likelihood of program access complaints and *reduce* the chances that parties would be able to negotiate carriage agreements.

---

[41] *See* EchoStar Comments, MB Dkt. No. 07-29, at 29 n.46 (Apr. 2, 2007); *see also Notice* ¶ 135.

A standstill would give an MVPD an incentive routinely to file a complaint to preserve its ability to carry a network. With a standstill in place, an MVPD would not face the prospect of losing access to a network and, therefore, would have reduced incentives to negotiate a carriage agreement with the network. There would be little downside to such a strategy. If the parties ultimately settled, the MVPD could simply withdraw the complaint.

The current situation -- with no standstill -- ensures that both parties have the incentive to negotiate. The risk of losing valuable programming helps keep an MVPD at the bargaining table, and the risk of losing carriage helps keep the program network at the bargaining table. Without these dual incentives and their inherent mutual assurances that both parties will continue to negotiate in good faith, the probability of negotiations devolving into needless complaint proceedings would increase, and with it the costs and burdens for the parties, the Commission, and ultimately consumers.[42]

---

[42] The *Notice* asks whether a party requesting a standstill should have to demonstrate that it satisfies the traditional criteria for interim relief, *i.e.*, it is likely to prevail on the merits, it will suffer irreparable harm absent a standstill, and the balance of harms and the public interest favor a standstill. *Notice* ¶ 137. TW opposes the adoption of any standstill requirement and, for the reasons described above, believes the Commission lacks authority to adopt one. However, if the Commission were nonetheless to go down this ill-advised path, it should recognize that when a party seeks injunctive relief (which is precisely what a standstill is), the law is clear that this is a request for "extraordinary relief," and courts therefore require such party to demonstrate, on a case-by-case basis with a sufficient evidentiary record, that it satisfies the foregoing criteria. *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

B. A Standstill Requirement Would Be Unworkable.

There are numerous problems that would make a standstill requirement impractical for any programming network, and particularly for premium networks.

1. A Standstill Requirement Would Be Unworkable For All Programming Networks.

If a standstill requirement were adopted, the parties and the Commission would be forced -- before any finding of a rule violation has been made -- to consider and resolve numerous questions relating to the carriage terms that would apply while the standstill is in effect. Such questions would include, for example, what rates will apply (for a multi-year, rising-rate contract); what carriage/penetration requirements will apply; how the parties will deal with breaches; how the grant of rights will be interpreted for new services like HDTV and new technologies such as mobile TV; how most favored nations provisions will apply; what will be the parties' liabilities in the case of service disruptions; whether assignment and delegation provisions will apply; and what provisions will apply when a cable operator acquires a new cable system.

Forcing the Commission to play "referee," with an obligation to adjudicate all the many complexities and nuances involved in a multitude of individual program carriage agreements -- before there has even been a finding that the programmer has violated the program access rules -- would ultimately harm programmers, MVPDs, the Commission, and consumers. It would necessitate that the parties submit yet another round of pleadings setting forth their views as to which contract provisions govern during the standstill period and how those provisions should be interpreted. The Commission would then need to deliberate on and adjudicate these disputes. In this sense, a standstill requirement is not only inconsistent with Congress' instruction that the

Commission "rely on the marketplace to the maximum extent feasible,"[43] but also with the Commission's goal of resolving program access disputes expeditiously.

2. A Standstill Requirement Would Be Particularly Inappropriate For Premium Networks.

The unique nature of premium networks makes a standstill particularly unnecessary and unworkable as applied to those networks. Premium networks like HBO are sold a la carte to consumers and must therefore build subscribership one customer at a time. There are two corollaries to this business reality:

First, marketing and promotion are critical to premium networks. Premium networks typically lose approximately five to six percent of their customers each month. This means that they need to replace roughly half of their customers each year *just to stay even*.[44] As a result, premium networks expend a disproportionate amount of resources on advertising and promotion.[45]

Second, because MVPDs have the relationship with the end-user customer, premium networks must work closely with MVPDs to build customer interest in their services. Thus, the carriage contracts between premium networks and MVPDs contain sophisticated and detailed marketing and promotion provisions. These provisions are the lifeblood of premium networks

---

[43] 1992 Cable Act, § 2(b)(2).

[44] *See* John M. Higgins, *Premium Networks Take A Hit*, Broadcasting & Cable, Feb. 9, 2004 (noting that "pay networks have to replace 40%-60% of their customers every year just to stay even"), *available at* http://www.broadcastingcable.com/article/CA380315.html.

[45] Premium networks typically spend between 15-25 percent of their net revenues on advertising and promotion, as compared to only two to six percent for basic networks. Booz, Allen, Hamilton, *The A La Carte Paradox: Higher Consumer Costs and Reduced Programming Diversity*, at 28 (July 2004) (attached to NCTA Comments, MB Dkt. No. 04-207 (filed July 15, 2004)).

and are among the most heavily negotiated provisions of a premium network's carriage contracts.

Under these circumstances, a standstill requirement is unnecessary because, contrary to the statement in the *Notice*,[46] a premium network has a strong incentive *not* to deauthorize an MVPD's carriage of its service. A premium network that deauthorizes an MVPD loses all of that MVPD's subscribers and those subscribers are lost even if the premium network and the MVPD ultimately resolve their dispute. Because a premium network would not be placed in a tier with an established subscriber base once the dispute is resolved, it would have to start all over again to convince each individual subscriber to take its service.

In addition, a standstill requirement would be unworkable for premium networks because of the intricacies of the marketing and promotion provisions in contracts between premium networks and MVPDs. Consider the following example:

- A premium network's contract with an MVPD expires on December 31, 2007.
- On December 30, 2007 the MVPD files a program access complaint and an automatic standstill is imposed.
- The prior contract was a multi-year deal that required the MVPD to participate in joint advertising campaigns with the network in the first quarter of 2005, the second quarter of 2006, and the third quarter of 2007.
- The MVPD argues that it cannot be required to participate in a joint advertising campaign in 2008 because there is no contractual obligation linked to 2008.
- The premium network responds that the joint advertising requirement is an integral part of the bargained-for exchange between the parties, and it would be unfair to allow the MVPD to enjoy the benefits of the prior contract *(i.e.*, continued carriage of the network) without meeting the obligations of the contract (*i.e.*, the joint marketing campaign).

---

46 *Notice* ¶ 137 ("We agree that the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations…").

It would be impossible for the Commission to resolve this dispute. The Commission has no effective mechanism to force the MVPD to participate actively in a joint marketing campaign, and no expertise for determining whether such a campaign should be conducted in the first, second, or third quarter of 2008. Suppose the MVPD flatly refused to participate in any marketing campaign, or did so only nominally. A standstill requirement that precluded the network from considering this a material breach and exercising the termination rights it bargained for and to which the MVPD agreed in the prior contract would fundamentally alter the contract the parties negotiated. And if the network is precluded during the standstill from terminating the MVPD in the case of a breach, there would be no way to prevent the MVPD from engaging in multiple breaches that effectively allow it to "pay what it wants" for the right to carry the network.

Moreover, the Commission has no mechanism to ensure that the MVPD would make the premium network whole if the complaint is ultimately resolved in favor of the network. Even if the Commission were able to resolve the complaint in a matter of months, the premium network may have lost hundreds of thousands of subscribers during that time because the MVPD failed to market and promote its service. HBO experienced this phenomenon during a recent program access complaint. While the complaint was pending, the MVPD declined to promote and market HBO's services, and HBO lost several hundred thousand subscribers. There is simply no way that an MVPD could magically replace such lost subscribers, or that a programmer could adequately recoup the lost revenue associated with those subscribers or the cost of getting them back. Given the importance of continuous marketing to a premium network, without contractually enforceable commitments to ensure that an MVPD actively promotes the network, a standstill would not preserve the "status quo," but, rather, would ensure a "slow death" as the premium network bleeds subscribers.[47]

IV. There Is No Factual Or Policy Basis for Adoption Of A Rule That Restricts A Programmer's Right To Offer MVPDs Discounts For Carriage of Multiple Networks.

As explained above, the Commission lacks authority to restrict programmers from offering discounts to MVPDs that carry multiple networks. Moreover, such a restriction makes no sense. The Commission has recognized that providing discounts for carriage of multiple networks is a lawful and competitive practice that provides many consumer benefits. For example, in a report to Congress, the Commission stated that "[b]undling programming channels into packages allows greater penetration of individual channels which lowers the per subscriber price MVPDs pay to programmers and benefits new or niche channels through subscriber awareness that is necessary for the survival of such new programming, especially when it is not

---

[47] *Notice* ¶ 107. A single commenter suggested the Commission should prohibit programmers from including non-disclosure agreements ("NDAs") in their carriage agreements with MVPDs. *See* OPASTCO/ITTA Comments, MB Dkt. No. 07-29, at 6 (Apr. 2, 2007). Carriage agreements are the most sensitive documents in the video programming industry and contain highly proprietary information. The Commission has consistently recognized that "disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider." *See*, *e.g.*, *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816 ¶ 61 (1998). For this reason, the Commission has frequently acted to *enhance* the ability of programmers to protect the confidentiality of their carriage contracts. *See*, *e.g.*, *EchoStar Satellite L.L.C. v. Home Box Office, Inc.*, Order, 21 FCC Rcd. 14197 ¶ 9 (2006); *News Corp., General Motors Corp., and Hughes Electronics Corp.*, Order, 18 FCC Rcd. 15198 ¶ 3 (2003). In addition, there is no need for a rule prohibiting NDAs. OPASTCO/ITTA claims it needs relief because NDAs preclude it from obtaining information regarding the "market value of programming." But the program access rules do not entitle OPASTCO/ITTA to that information. The rules only require that satellite cable programmers treat MVPDs in a non-discriminatory fashion compared with competing MVPDs. If an OPASTCO/ITTA MVPD member believes a programmer is discriminating against it, the MVPD may file a program access complaint and use the procedures established by the Commission to obtain access to the information necessary to prove its claim. There is no basis for punishing all programmers by precluding use of a normal contractual tool that allows them to protect their highly confidential business information, especially where doing so would be an invitation to price fixing in the industry.

associated with a 'brand name' entity."[48] And in its program access rules, the Commission specifically allows cable-affiliated programmers to differentiate in prices between distributors based on a "distributor's purchase of programming in a package or a la carte."[49]

Congress has also found that it is appropriate and pro-competitive for programmers to offer their networks to MVPDs in bundles.[50] Similarly, the courts have recognized that "[b]undled discounts generally benefit buyers because the discounts allow the buyer to get more for less,"[51] and legal scholars have explained that "[t]he great majority of discounting practices are procompetitive."[52] As one federal court recently observed:

> Bundled discounts are pervasive, and examples abound. Season ticket holders, fast food value meals, all-in-one home theater systems -- all are bundled discounts. . . . The fact that such diverse sellers offer bundled discounts shows that such discounts are a fundamental option for both buyers and sellers.[53]

---

48 *Annual Assessment Of The Status Of Competition In The Market For The Delivery Of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606 ¶ 173 (2004) (citations omitted).

49 47 C.F.R. § 76.1002(b)(1), Note 2.

50 *See* S. Rep. No. 102-92 at 35-36 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1168-69 (Senate Report accompanying 1992 Cable Act) ("Cable operators pay for the cable programming services they offer to their customers . . . programming services which originate on a broadcast channel should not be treated differently. It is true that broadcasters also benefit from being carried on cable systems, and many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system. Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system.")

51 *See Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895, 906 (9th Cir. 2007) ("*PeaceHealth*"); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 12 (1984) ("*Jefferson Parish*") ("Buyers often find package sales attractive.").

52 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 749b at 324 (Supp. 2006).

53 *See PeaceHealth,* 502 F.3d at 905. *See also Mediacom Commc'ns Corp. v. Sinclair Broad. Group, Inc.*, 460 F. Supp. 2d 1012, 1024 (S.D. Iowa 2006) (The "philosophy of buy more, save more, is encountered by consumers in everyday life, where consumers are given the choice to realize higher savings by buying in bulk, e.g., buy two get one free.").

Any restriction on a programmer's right to bundle would eliminate these benefits. If a programmer cannot offer discounted bundles, MVPDs will pay more for programming -- as the Commission has recognized -- and so, too, will consumers.

In the *Notice*, the Commission mistakenly refers to bundling as "tying." Tying is a well-defined term, and the antitrust courts have made clear that tying occurs when the seller has market power in the tying product and gives the buyer no option other than to purchase the tied product in order to get the tying product.[54] Given the breadth and diversity of programming networks today, and the low barriers to entry -- as evidenced by the fact that there are over 500 national programming networks[55] -- TW does not believe any cable network has (or could have) market power. Moreover, the prevalent practice among programmers that offer their services in bundles to MVPDs is to offer the networks individually as well. The courts have made clear that "[w]here the buyer is free to take either product by itself, there is no tying problem even though the seller may also offer the two items as a unit at a single price."[56] Thus, any implication that programmers are engaging in tying is mistaken.

---

54 *See, e.g., Jefferson Parish*, 466 U.S. at 12 ("[o]ur cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.").

55 *See* Press Release, FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* at 4 (Nov. 27, 2007) (noting that in 2006 the Commission "identified 565 satellite-delivered national programming networks, an increase of 34 networks over the 2005 total of 531 networks.").

56 *Marts v. Xerox, Inc.*, 77 F.3d 1109, 1112 (8th Cir. 1996) (citing *N. Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 6 n.4 (1958)). The *Notice* cites EchoStar's allegation in a recent program access complaint that HBO would not sell EchoStar the HBO service unless EchoStar also agreed to purchase Cinemax. *Notice* ¶ 119, n.527. That allegation is false.

Even if tying did occur in an isolated instance, however, that conduct is already comprehensively covered by the antitrust laws and decades of court precedent construing those laws. The antitrust laws establish tests for determining whether the behavior in question is unlawful and require that behavior to be assessed in the context of a full evidentiary record. There is no reason for the Commission to amend its rules to address such conduct, and under no circumstances would the Commission be justified in adopting rules more restrictive than, or in any other way in conflict with, the antitrust laws.

Finally, any restriction on bundling that the Commission attempts to impose only on vertically integrated programmers would be arbitrary and capricious. The Commission has already acknowledged that the competitive and consumer harms (if any) associated with bundling would be "*the same* regardless of whether the programmer is affiliated with a cable operator or a broadcaster or is affiliated with neither a cable operator nor a broadcaster."[57] Consequently, a Commission ruling that a bundled sale of programming by a vertically integrated programmer would be considered an "unfair method of competition," whereas a similar sale by a non-integrated programmer would be perfectly legitimate, despite the identical effects (if any) that both sales would have on the marketplace,[58] is contrary to well-established principles of administrative law.[59]

---

[57] *Notice* ¶ 120 (emphasis added).

[58] The Commission acknowledged that the effects of tying -- to the extent there are any -- are unrelated to vertical integration. *Id.* ¶ 120.

[59] "An agency must provide an adequate explanation to justify treating similarly situated parties differently." *Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 776 (D.C. Cir. 2005) ("*Burlington*"); *see also Petroleum Commc'ns Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (and cases cited therein); *Willis Shaw Frozen Express, Inc. v. ICC*, 587 F.2d 1333, 1336 (D.C. Cir. 1978); *Ace Motor Freight, Inc. v. ICC*, 557 F.2d 859, 862 (D.C. Cir. 1977). "Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and

(footnote continued…)

V. Conclusion

The Commission lacks jurisdiction to adopt a standstill requirement in program access disputes or any restrictions on the ability of programmers to bundle their networks and offer discounts to MVPDs that carry the bundle. Moreover, there is no factual record or policy basis upon which the adoption of either proposal could be based. In addition, both proposals would violate the First Amendment. TW respectfully requests that the Commission reject both proposals.

Respectfully submitted,

/s/ Michael H. Hammer

Michael H. Hammer
Jonathan Friedman
Megan Anne Stull
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
Attorneys For Time Warner Inc.

January 4, 2008

(…footnote continued)

capricious and cannot be upheld." *Burlington*, 403 F.3d at 777; *see also Willis Shaw Frozen Express, Inc.*, 587 F.2d at 1336; *Ace Motor Freight, Inc.*, 557 F.2d at 862.